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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 RICHARD LEE AUSTIN, JR.,

12 Petitioner,

13 v.

14 EDWARD BORIA, Acting Warden,

15 Respondent.
16

Case No. 8:23-cv-02455-FLA (E)

**ORDER ACCEPTING FINDINGS
AND RECOMMENDATIONS OF
UNITED STATES MAGISTRATE
JUDGE**

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18 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the records
19 on file, and the Report and Recommendation of the United States Magistrate Judge.
20 Further, the Court has engaged in a *de novo* review of those portions of the Report
21 to which objections have been made.

22 The Report and Recommendation (“Report”) recommends denial of the
23 Petition and dismissal of this action with prejudice. Dkt. 21. Specifically, the
24 Report recommends denial of Petitioner’s claim that the evidence presented at his
25 state court trial was insufficient to support his conviction for attempted murder. *Id.*
26 As explained below, Petitioner’s objections to the Report, Dkt. 22, do not warrant a
27 change to the Magistrate Judge’s findings or recommendation.

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1 Petitioner objects that the evidence was insufficient to prove he performed a
2 direct but ineffectual act toward accomplishing the intended killing because he “did
3 not even draw the gun.” Dkt. 22 at 2. As the Report explained, however, a
4 “defendant need not point a gun at an intended victim to be guilty of attempted
5 murder. . . .” Dkt. 21 at 19 (quoting *People v. Garton*, 4 Cal. 5th 485, 514 (2018),
6 and collecting other cases).

7 Petitioner objects that the evidence showed nothing more than preparation,
8 which is distinct from an attempt. Dkt. 22 at 3. As support, Petitioner cites *People*
9 *v. Johnson*, 57 Cal. 4th 250, 258 (2013), in which the California Supreme Court
10 explained that if the defendant “buys a gun and plans the shooting, but does no
11 more, he will not be guilty of attempt.” Dkt. 22 at 3. This objection overlooks the
12 Report’s analysis that this authority is consistent with the state court’s decision in
13 this case. Dkt. 21 at 19. In *Johnson*, the California Supreme Court cited, with
14 approval, a decision affirming a conviction for attempted murder in a case with
15 facts similar to the facts of this case. *Johnson*, 57 Cal. 4th at 258 n.4 (citing *People*
16 *v. Morales*, 5 Cal. App. 4th 917, 927 (1992) (substantial evidence of attempted
17 murder where the defendant “loaded his gun, drove to his victim’s neighborhood,
18 and finally hid in a position that would give him a clear shot at [the victim] if [the
19 victim] left by the front door”)). As the Report explained, Petitioner went to the
20 victim’s workplace and lurked in the parking garage stairwell while (it may
21 reasonably be inferred) he was carrying firearm. Dkt. 21 at 18. Petitioner also
22 acknowledged that he had the opportunity to shoot the victim and her coworkers
23 who accompanied her to the garage. *Id.* at 13. Under state law on attempts, this
24 evidence was sufficient to establish a direct but ineffectual act toward
25 accomplishing the intended killings.

26 Petitioner objects that the “slight acts rule,” which requires an overt act in
27 furtherance of the design, “requires that the defendant, at the least, draw the
28 firearm.” Dkt. 22 at 5. As the Report explained, however, the court is bound by the

1 California Court of Appeal's interpretation of the slight acts rule as not requiring
2 the drawing of a firearm. Dkt. 21 at 19-20. Moreover, as noted above, the
3 California Supreme Court cited with approval a decision finding sufficient evidence
4 of slight acts in a case with facts similar to those of this case. *See Johnson*, 57 Cal.
5 4th at 258 n.4 (citing *People v. Morales*, 5 Cal. App. 4th 917, 927 (1992) (finding
6 sufficient evidence of "slight acts" where the defendant "loaded his gun, drove to
7 his victim's neighborhood, and finally hid in a position that would give him a clear
8 shot at [the victim] if [the victim] left by the front door"))).

9 Petitioner objects that his case is distinguishable from several other state law
10 cases finding sufficient evidence of attempted murder. Dkt. 22 at 5-6. This
11 objection does not overcome the Report's analysis that, under state law, Petitioner
12 need not have drawn a gun to be found guilty of attempted murder.

13 Petitioner objects that the California Court of Appeal "essentially held that
14 the mere possession of a gun coupled with being sufficiently close to the victim to
15 try to shoot her is sufficient to constitute the actus reus of attempted murder." Dkt.
16 22 at 7. This objection mischaracterizes the California Court of Appeal's decision,
17 which explained, in detail, why Petitioner's conduct went beyond mere preparation
18 and planning. Dkt. 18-33 at 11-12.

19 In sum, Petitioner's objections are overruled.

20 ORDER

21 It is ordered that (1) the Report and Recommendation of the Magistrate Judge
22 is accepted and adopted; and (2) Judgment shall be entered denying and dismissing
23 the Petition with prejudice.

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25 DATED: July 1, 2024

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FERNANDO L. AENLLE-ROCHA
United States District Judge